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No. 87-1165

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court has jurisdiction over this suit challenging the United States' claim that it holds title to certain land in trust for the benefit of an Indian Tribe.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*:
- 373 U.S. 546 (1963) 1, 2, 3, 4
- 376 U.S. 340 (1964) 3, 4
- 439 U.S. 419 (1979) 4, 5
- 460 U.S. 605 (1983) 2, 5, 6, 17-18, 19-20

Block v. *North Dakota*, 461 U.S. 273 (1983) 8, 9, 10, 11, 12, 18

Bryant v. *Yellen*, 447 U.S. 352 (1980) 3

Dugan v. *Rank*, 372 U.S. 609 (1963) 9, 16

Fadem v. *United States*, 791 F.2d 1381 (9th Cir. 1986) 8, 11

Fidelity & Casualty Co. v. *Reserve Insurance Co.*, 596 F.2d 914 (9th Cir. 1979) 19

Florida Dep't of Business Regulation v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) 8, 14

Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. *United States*, 832 F.2d 1127 (9th Cir. 1987) 17

Jones v. *Watts*, 142 F.2d 575 (5th Cir. 1944) 18

Minnesota v. *United States*, 305 U.S. 382 (1939) 18, 19

Navajo Tribe of Indians v. *New Mexico*, 809 F.2d 1455 (10th Cir. 1987) 13

Pueblo of Taos v. *Andrus*, 475 F. Supp. 359 (D.C.C. 1979) 13

Solem v. *Bartlett*, 465 U.S. 463 (1984) 13

South Delta Water Agency v. *United States Dep't of Interior*, 767 F.2d 531 (9th Cir. 1985) 17

Cases – Continued: Page

Spaeth v. *United States Secretary of Interior*, 757 F.2d 937 (8th Cir. 1985) 15, 16
United v. *Martin*, 267 F.2d 764 (10th Cir. 1959) 18
United States v. *Mottaz*, 476 U.S. 834 (1984) 8, 9, 11, 12, 15
United States v. *Shaw*, 309 U.S. 495 (1940) 18
United States v. *Taunah*, 730 F.2d 1360 (10th Cir. 1984) 18
United States v. *The Thekla*, 266 U.S. 328 (1924) 18
Wildman v. *United States*, 827 F.2d 1306 (9th Cir. 1987) 16

Statutes:

Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*:
5 U.S.C. (& Supp. IV) 701 *et seq.* 5
5 U.S.C. 701(a)(1) 10
5 U.S.C. (& Supp. IV) 702 ..... 8, 10
5 U.S.C. 706(2)(C) 7
5 U.S.C. 706(2)(D) 7

Boulder Canyon Project Act, 43 U.S.C. (& Supp. III) 617-617t 2

Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3(a), 100 Stat. 637 (to be codified at 28 U.S.C. 1441(e)) 19

Quiet Title Act, 28 U.S.C. 2409a 10
28 U.S.C. 2409(a) 8, 9, 10, 14
28 U.S.C. 2409(c) 12

25 U.S.C. 465 14

28 U.S.C. (& Supp. III) 1292(b) 8

43 U.S.C. 666 (McCarran Amendment) 9, 10, 16

43 U.S.C. 772 ..... 7, 8, 19

Miscellaneous:

H.R. Rep. 92-1559, 92d Cong., 2d Sess. (1972) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 830 F.2d 139. The opinion of the district court (Pet. App. 12a-26a) is reported at 628 F. Supp. 1018.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1987, and the petition for a writ of certiorari was filed on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge by petitioners to orders of the Secretary of the Interior that redetermined the boundaries of three Indian Reservations for which reserved water rights were recognized in *Arizona* v. *California*, 373 U.S. 546, 598-600 (1963) (*Arizona* v. *California I*). The dispute

over the boundaries of the three Reservations was left unresolved in *Arizona* v. *California,* 460 U.S. 605, 628-641 (1983) (*Arizona* v. *California II*).

In the instant case, the parties agreed to litigate first the validity of the Secretary's order that redetermined the boundary of a portion of the Fort Mojave Indian Reservation, located in southern California and Arizona. In that order, which was entered on June 3, 1974, the Secretary resolved an internal inconsistency in the original legal description of the Hay and Wood Reserve portion of the Reservation. The Secretary determined that approximately 3500 acres that were treated in 1974 as non-Indian public lands, managed by the Bureau of Land Management, were actually part of the original Reservation. The Secretary therefore declared null and void a 1928 survey of the Hay and Wood Reserve that had erroneously excluded the 3500 acres and directed a resurvey to add that area to the Reservation. The plat of the resurvey was filed on November 6, 1978. Pet. App. 3a & n.2, 11a, 13a-14a, 16a; *Arizona* v. *California II,* 460 U.S. at 631-632.

2. As noted above, the controversy concerning the size of the Fort Mojave Reservation has surfaced twice in *Arizona* v. *California,* in which this Court apportioned the waters in the Lower Basin of the Colorado River. In *Arizona* v. *California I* the Court held that the Boulder Canyon Project Act, 43 U.S.C. (& Supp. III) 617-617t, mandates a scheme for apportioning the mainstream waters of the Colorado River among the states in the Lower Basin and empowers the Secretary of the Interior to effectuate that apportionment by making contracts for the delivery of water. 373 U.S. at 564-565. Under the statutory scheme, however, the Secretary must satisfy certain prior rights, called "present perfected rights," before furnishing water under

contracts. *Id.* at 584. See *Bryant* v. *Yellen,* 447 U.S. 352, 364-365 (1980).[1] The two public water agencies that are petitioners in this case, the Metropolitan Water District (MWD) and the Coachella Valley Water District, receive Colorado River water under Project Act contracts with the Secretary. By contrast, the United States has a present perfected right to the use of sufficient Colorado River water "to irrigate all the practicably irrigable acreage" on the Fort Mojave Reservation. *Arizona* v. *California I,* 373 U.S. at 600. That right was reserved for the benefit of the Fort Mojave Tribe when the Reservation was established in 1890 and 1911 (376 U.S. 340, 345 (1964) (decree)), and therefore is senior to the rights of the two water-agency petitioners. Accordingly, if the 3500-acre area at issue here is part of the original Reservation, the United States is entitled to a reserved water right—with a priority date senior to the contractual rights of the water-agency petitioners—for any practicably irrigable acreage within that area.

In hearings preceding the decision in *Arizona* v. *California I,* Special Master Rifkind received evidence on the boundary question and concluded that the United States was bound by the 1928 survey that drew the boundary of the Fort Mojave Reservation to exclude the 3500 acres. He then relied on that boundary determination in calculating the number of practicably irrigable acres on the Reservation and the corresponding number of acre-feet of water necessary to satisfy the present perfected right for the Reservation.

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[1] The Court defined "perfected rights" as, inter alia, "water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use." The Court defined "present perfected rights" as "perfected rights * * * existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Arizona* v. *California,* 376 U.S. 340, 341 (1964) (decree).

However, the Court declined to adopt Special Master Rifkind's recommendation regarding the boundary issue, explaining (373 U.S. at 601):

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

Nevertheless, in its 1964 decree, the Court used Special Master Rifkind's calculations, which excluded the 3500 acres, in establishing the amount of water reserved for the Reservation. 376 U.S. at 345. But the Court included a proviso in its decree that contemplated a future resolution of the boundary dispute (*ibid.*):

> [T]he quantities fixed * * * shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations [including the Fort Mojave Indian Reservation] are finally determined.

See also 439 U.S. 419, 421, 426 (1979) (supplemental decree).

3.a. After the Secretary filed the official plat of the resurvey of the Hay and Wood Reserve in November 1978 (see page 2, *supra*), the United States filed a motion in this Court in December 1978 requesting the Court to amend the decree in *Arizona* v. *California* to increase the quantity of water to which the United States is entitled for the Fort Mojave Reservation. The United States argued that the Secretary's 1974 order and 1978 resurvey had "finally determined" the boundary of the Reservation within the meaning of the proviso to the 1964 decree of this Court, quoted above, and that the United States, on behalf of the Tribe, was therefore entitled to the additional water necessary to

irrigate the "practicably irrigable acreage" within the 3500-acre area that was restored to the Reservation. The Court referred the United States' motion to amend the decree to the new Special Master, Elbert P. Tuttle. 439 U.S. at 436-437 (supplemental decree).

In a preliminary report issued on August 28, 1979, Special Master Tuttle agreed with the United States that the Secretary's 1974 order had "finally determined" the boundary of the Fort Mojave Reservation and that the decree should be amended to increase the quantity of water under the present perfected right for the Reservation. *Arizona* v. *California II*, 460 U.S. at 612-613. However, on July 21, 1981, before the Special Master issued his final report, petitioners MWD and Coachella filed the instant suit against the Secretary of the Interior in the United States District Court for the Southern District of California.[2] Invoking the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, as a basis for judicial review, petitioners requested the court to set aside the Secretary's 1974 order and to issue a declaratory judgment locating the western boundary of the Hay and Wood Reserve so as to exclude the 3500 acres from the Reservation. The district court stayed its proceedings pending this Court's ruling on the exceptions to Special Master Tuttle's final report. Pet. App. 5a.

b. In *Arizona* v. *California II*, the Court rejected Special Master Tuttle's recommendation that the Court amend the decree to increase the quantity of water allocated to the Fort Mojave Reservation on the basis of the Secretary's 1974 order and the 1978 resurvey. The Court stated that when it rendered the decision in *Arizona* v. *California I* and

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[2] The States of California and Arizona were subsequently joined as defendants. Pet. 2.

entered the implementing decree, it

> in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

460 U.S. at 636. The Court then expressed its preference that the boundary dispute be settled outside of the proceedings in *Arizona* v. *California,* and the Court referred specifically to the instant case, which was then pending (but had been stayed) in the district court (*id.* at 638 & n.27). At the same time, the Court recognized that there might be jurisdictional obstacles that would render it impossible for the district court to resolve the boundary issue in this case (*id.* at 638 (footnotes omitted)):

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

See also *id.* at 658 n.10 (Brennan, J., dissenting).

4. The proceedings in the instant case recommenced after this Court rendered its decision in *Arizona* v. *California II.* As petitioners note (Pet. 10), on June 17, 1983, the United States withdrew most of the jurisdictional objections that it had raised in the motion to dismiss to which this Court referred in *Arizona* v. *California II.* Thereafter, in a decision rendered on February 25, 1986, the district court set aside the Secretary's order under the APA (Pet. App. 12a-26a).

The court first held that the 1974 order and 1978 resurvey exceeded the Secretary's statutory authority within the meaning of the APA, 5 U.S.C. 706(2)(C). The court relied on 43 U.S.C. 772, which permits the Secretary to resurvey public lands but provides that "no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." The court rejected the contention by the United States and the Tribes that the quoted proviso protects only those persons who claim an interest in the land itself, and concluded instead that petitioner MWD must be regarded as a "claimant" because its contractual water rights would be affected if the United States is entitled to a reserved water right to irrigate land in the area added to the Reservation by the resurvey. Pet. App. 19a-20a.

The court also held that the Secretary's 1974 order was issued without observance of procedures required by law within the meaning of the APA, 5 U.S.C. 706(2)(D), because it adversely affected the water agencies' property rights under their water right contracts without affording them an opportunity to be heard (Pet. App. 20a-24a). Having set aside the Secretary's order, the court concluded that it would make a de novo determination of the proper location of the disputed boundary, rather than remanding the matter to the Secretary, and it therefore set the case for further proceedings (*id.* at 20a, 24a).

5. The district court certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals granted leave to appeal. In considering the issues to be raised on appeal, we re-examined the question of the district court's jurisdiction in light of two court of appeals decisions that had been rendered since the United States withdrew its jurisdictional objections in the district court. See *Fadem* v. *United States,* 791 F.2d 1381 (9th Cir. 1986) (holding that a challenge to a boundary survey under 43 U.S.C. 772 may be brought only under the Quiet Title Act (QTA), 28 U.S.C. 2409a(a)); and *Florida Dep't of Business Regulation* v. *United States Dep't of Interior,* 768 F.2d 1248 (11th Cir. 1985) (holding that the "Indian lands" exception to the Quiet Title Act, 28 U.S.C. 2409a(a), bars a suit under the APA challenging the Secretary's right to hold land in trust for Indians), cert. denied, 475 U.S. 1011 (1986). Based on those decisions and their elaboration upon the principles of sovereign immunity under the Quiet Title Act announced in *Block* v. *North Dakota,* 461 U.S. 273 (1983), and *United States* v. *Mottaz,* 476 U.S. 834 (1986), the United States renewed its argument that the district court was without jurisdiction in this case. The court of appeals agreed and remanded the case with directions to dismiss the complaint (Pet. App. 1a-11a).

The court of appeals first rejected petitioners' contention that the United States had waived its sovereign immunity to suit in the district court by intervening in the original proceedings in this Court in *Arizona* v. *California* (Pet. App. 7a-8a). The court of appeals next held that the APA does not furnish the requisite waiver of sovereign immunity, because the APA "does not waive immunity as to any claims which are expressly or impliedly forbidden by 'any other statute that grants consent to suit' " (*id.* at 9a (quoting 5 U.S.C. (& Supp. IV) 702)). The court concluded that the QTA is such a statute, because it grants consent to certain

suits challenging the United States' title to real property but expressly withholds consent to suits challenging the United States' title to "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). Pet. App. 9a. The court rejected petitioners' contention that the QTA is inapplicable because petitioners do not assert an interest in the 3500 acres that were included in the Reservation by the resurvey of the boundary. It reasoned that "[t]he effect of a successful challenge would be to quiet title in others than the Tribe" (*ibid.*) and that "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a). Finally, the court of appeals held that the McCarran Amendment, 43 U.S.C. 666, does not provide the necessary consent to this suit because this suit is not a general stream adjudication (Pet. App. 11a, citing *Dugan* v. *Rank,* 372 U.S. 609, 617-618 (1963)).

ARGUMENT

The court of appeals correctly held that Congress has not waived the sovereign immunity of the United States to this suit challenging the United States' claim that it holds land in trust for the Fort Mojave Indian Tribe. That holding is fully consistent with this Court's decisions in *Block* v. *North Dakota,* 461 U.S. 273 (1983), and *United States* v. *Mottaz,* 476 U.S. 834 (1986), and with the decisions of other courts of appeals. Moreover, petitioners do not suffer any immediate injury by the decision below, because the 1974 Secretarial order they challenge cannot result in an allocation of more water for the benefit of the Tribe unless and until petitioners have been afforded a suitable opportunity to challenge that order and this Court amends its decree in *Arizona* v. *California.* Review of the jurisdictional ruling below therefore is not warranted.

1. The APA neither furnishes petitioners with a cause of action nor waives the United States' immunity to suit in this case. Although the APA provides a broad waiver of sovereign immunity to suits challenging agency action where the relief sought is other than money damages, that waiver, by its terms, does not "affect[ ] other limitations on judicial review" or "confer[ ] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. (& Supp. IV) 702. Here, the entire subject matter of challenges to claims by the United States to real property is comprehensively governed by the Quiet Title Act (QTA), 28 U.S.C. 2409a, and the QTA therefore displaces the APA as the avenue of judicial review. The QTA in turn expressly precludes judicial review (see 5 U.S.C. 701(a)(1)) and forbids relief affecting the United States' title where the plaintiff challenges the United States' claim of title to real property for the benefit of Indians. See 5 U.S.C. 702; 28 U.S.C. 2409a(a).

a. In the QTA, Congress waived the United States' immunity to certain suits to quiet title to land in which the United States claims an interest. *Block* v. *North Dakota*, 461 U.S. at 280. However, Congress expressly retained the United States' immunity to suits challenging the United States' title to "trust or restricted Indian lands." 28 U.S.C. 2409a(a).[3] As a result of this exception, "[w]hen the United

[3] The Quiet Title Act provides in pertinent part (28 U.S.C. 2409a(a)):

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425 and 7426) or section 208 of the Act of July 10, 1952 (43 U.S.C. 666) [the McCarran Amendment].

States claims an interest in real property based on that property's status as trust or restricted Indian land, the Quiet Title Act does not waive the Government's immunity." *Mottaz*, 476 U.S. at 843 (footnote omitted). As this Court has pointed out (*Block*, 461 U.S. at 273; *Mottaz*, 476 U.S. at 842-844), and as the court below explained (Pet. App. 9a-10a), Congress decided to retain sovereign immunity from suits challenging the United States' title to Indian land in order to protect the "solemn obligations" and "specific commitments" made by the United States to Indian people against disruption by third parties. H.R. Rep. 92-1559, 92d Cong., 2d Sess. 13 (1972). Congress was concerned that "[a] unilateral waiver of the Federal Government's immunity would subject these lands to suit without the Indians' consent." *Mottaz*, 476 U.S. at 843 n.6.

This Court has twice held that " 'Congress intended the QTA to provide the *exclusive* means by which adverse claimants could challenge the United States' title to real property.' " *Mottaz*, 476 U.S. at 841 (quoting *Block*, 461 U.S. at 286 (emphasis added)). If it were otherwise, the Court stressed, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted" (*Block*, 461 U.S. at 284-285). In particular, the Court observed that if it "were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory" (*id.* at 285). Prior to its decision in the instant case, the Ninth Circuit had held that, under *Block* v. *North Dakota*, the QTA is the exclusive avenue for resolution of all boundary disputes with the Federal Government, because the location of the boundary serves to delineate the Government's claim of an interest in the property enclosed. *Fadem* v. *United States*, 791 F.2d 1381, 1382-1383 (1986). The Ninth Circuit's decision in the instant case simply applies that prin-

ciple to a dispute over the location of a boundary that encloses lands held in trust for Indians: Because the QTA expressly bars suits concerning title to Indian trust lands, it necessarily bars this suit concerning the location of a boundary that encloses such lands. *Block* v. *North Dakota* makes clear that petitioners cannot circumvent that bar by bringing a suit under the APA. 461 U.S. at 286 n.22.

b. Petitioners nevertheless seek to avoid that bar by contending (Pet. 19-24) that the QTA is inapplicable here because they do not claim title to the 3500 acres in question or seek to divest the United States of title to that land. Contrary to petitioners' view, however, the fact that they claim no interest in the land itself weighs against, not in favor of, recognizing a right in petitioners to bring the instant suit. When Congress passed the QTA, it permitted challenges to the United States' claim of title to real property to be brought only by plaintiffs who themselves claim an interest in the same property. This limitation is evident from the requirement that the complaint in a QTA action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property" (28 U.S.C. 2409a(c)). The purpose of the QTA is to authorize the district court to resolve the conflicting claims and to quiet title as between the adverse parties. By contrast, Congress did not consent to suits by third parties, such as petitioners herein, who might wish to bring about the resolution of a dispute over the United States' claim of title to property, but who have no interest in the property itself. Without such a limitation, the United States would be exposed to numerous lawsuits by mere bystanders and intermeddlers.

Moreover, as the court of appeals concluded, although the petitioners "may not be seeking to quiet title to the land in [themselves,]" the "effect of a successful challenge would be to quiet title in others than the Tribe" (Pet. App. 9a)—

namely, in the United States, which would then hold the land in fee simple, rather than in trust for the Tribe.[4] Thus, "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a).[5] That is precisely the consequence that Congress sought to avoid by including in the QTA the bar to suits challenging the trust status of lands that the United States claims on behalf of Indians. Because the relief peti-

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[4] Indeed, petitioners seek to assert the interests of the United States in claiming fee ownership of the 3500 acres, in derogation of the Tribe's beneficial interest. There is no reason to believe that Congress intended to permit third parties to invoke the jurisdiction of the courts in order to advance the government's interests in this manner.

[5] Contrary to petitioners' contention (Pet. 21-22), nothing in the decision below affects the authority of a court in a criminal prosecution or habeas corpus action to consider the question of reservation boundaries for purposes of determining the criminal jurisdiction of the federal, state and tribal governments. For this reason, *Solem* v. *Bartlett*, 465 U.S. 463 (1984), cited by petitioners (Pet. 22), is inapposite, because the Court there considered whether Congress, by statute, had diminished the political boundaries of an Indian reservation; the Court did not address questions of title. In *Navajo Tribe of Indians* v. *New Mexico*, 809 F.2d 1455 (10th Cir. 1987), also cited by petitioners (Pet. 21), the court in fact held that the QTA is the exclusive avenue for challenging the United States' title (*id.* at 1468-1469); in the passage quoted by petitioners, the court stated that an adjudication of boundaries is conceptually distinct from an adjudication of title because boundary questions may affect political jurisdiction (*id.* at 1475). Here, by contrast, only the question of title is presented. Finally, *Pueblo of Taos* v. *Andrus*, 475 F. Supp. 359 (D.D.C. 1979), upon which petitioners rely (Pet. 21), is not at all instructive, because it was decided before this Court held in *Block* and *Mottaz* that the QTA is the exclusive means for challenging the United States' title.

tioners seek therefore is expressly forbidden by the QTA, it may not be granted by a court under the APA.[6]

The Eleventh Circuit reached the same conclusion in similar circumstances in *Florida Dep't of Business Regulation* v. *United States Dep't of Interior,* 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986). There, the State of Florida and several of its subdivisions sued the Secretary of the Interior under the APA challenging the Secretary's decision to take a certain parcel of land in trust for the Seminole Tribe under 25 U.S.C. 465. The plaintiffs did not assert any property interest in the land and did not seek to quiet title to the land in themselves. 768 F.2d at 1254. Rather, they objected to the decision to take the land in trust because the Seminole Tribe used the trust land to sell tax-free cigarettes and operate bingo games. *Id.* at 1250-1251. In holding that the suit was barred by the QTA, the Eleventh Circuit explained (*id.* at 1254-1255 (footnotes omitted)):

> Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

[6] Petitioners' effort to circumvent the QTA is further undermined by the fact that their ultimate goal is to divest the United States and the Tribe of the reserved water right for irrigable acreage in the area restored to the Reservation by the 1974 order and 1978 resurvey. The QTA expressly precludes suits concerning the validity of "water rights." 28 U.S.C. 2409a(a). Thus, petitioners seek to avoid both the "Indian lands" and "water rights" exceptions to the QTA.

c. Finally, petitioners contend (Pet. 24-26) that the Ninth Circuit misapplied the "Indian lands" exception in the circumstances of this case. Petitioners rely on *Spaeth* v. *United States Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985), where the court held that in order to invoke the Indian lands exception, the United States must show that there is a "substantial possibility" that the lands in question are trust or restricted Indian lands. *Id.* at 943. This argument is erroneous for several reasons.

First, the Eight Circuit's decision in *Spaeth* preceded this Court's decision in *Mottaz,* in which the Court stated that "when the United States *claims* an interest in real property based on that property's status as trust or restricted Indian land, the Quiet Title Act does not waive the government's immunity." 476 U.S. at 843 (emphasis added; footnote omitted). Thus, the protection afforded the United States and the Tribe by the Indian lands exception turns on the nature of the United States' claim, not on whether a court finds a "substantial possibility" that the United States will

prevail on the merits of that claim. As the court of appeals held in this case, the United States is not " 'to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians.' " Pet. App. 10a-11a (quoting *Wildman* v. *United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)).

Second, even if we assume that the Eighth Circuit would follow *Spaeth* in light of this Court's intervening decision in *Mottaz*, this case presents no conflict with *Spaeth*. The district court here expressly found that there was an inconsistency in the legal description of the Reservation and that there are "genuine issues" of material fact and a "lively dispute" regarding the boundaries and acreage intended by the United States when the Reservation was established (Pet. App. 16a, 25a). Moreover, the Secretary of the Interior made a formal determination, based on an exhaustive analaysis of numerous documents, that the land in question is held in trust for the benefit of an Indian tribe. Those circumstances are more than sufficient to give rise to a "substantial possibility" that the 3500 acres are Indian trust lands. By contrast, in *Spaeth* there was no such formal determination that the lands in question were held in trust for the benefit of Indians (see 757 F.2d at 942-946).

2. The court of appeals also correctly held that the district court does not have jurisdiction over this case under the McCarran Amendment, 43 U.S.C. 666, which consents to the joining of the United States as a defendant in any suit "for the adjudication of rights to the use of water of a river system or other source * * *." This Court made clear in *Dugan* v. *Rank*, 372 U.S. 609, 617-618 (1963), that the McCarran Amendment waives the United States' sovereign immunity only to suits to adjudicate the rights of *all* claimants on a stream; this suit, however, "is not such a general adjudication" (Pet. App. 11a (footnote omitted)).

Petitioners' contention (Pet. 27) that this suit is a "partial" water rights adjudication therefore is beside the point. In fact, this obviously is not a water rights adjudication at all. The only relevant adjudication of water rights is in this Court, in *Arizona* v. *California*. This suit, by contrast, directly challenges only the Secretary's boundary determination and the nature of the United States' title to *land*; for this reason, even if petitioners were to prevail on the merits, the judgment of the district court would not quantify the parties' respective water rights.[7]

3. Finally, petitioners are clearly wrong in asserting (Pet. 14-18) that by intervening in *Arizona* v. *California*, the United States waived its sovereign immunity to this separate suit. See Pet. App. 8a. When the Court in *Arizona* v. *California II* referred to this suit as a possible forum for the final determation of the boundary dispute, the Court acknowledged that the United States had moved to dismiss

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[7] Petitioners err in relying (Pet. 28) on *South Delta Water Agency* v. *United States Dep't of Interior*, 767 F.2d 531, 540-541 (9th Cir. 1985). There, the Ninth Circuit held that sovereign immunity did not bar an action to require the Secretary of the Interior to operate certain facilities of the Central Valley Project in California in accordance with state law and in a manner that did not interfere with the rights of other water users. The plaintiffs in *South Delta* did not challenge the United States' title to land or water rights, and that suit (unlike this one) was not governed by the QTA (see *id.* at 541-543). Similarly, in *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts* v. *United States*, 832 F.2d 1127 (9th Cir. 1987), also cited by petitioners (Pet. 28), the court disavowed any purpose to adjudicate water rights. 832 F.2d at 1130. Rather, that case involved a challenge to the Secretary's operation of a project to protect Indian fishery interests. The *Joint Board* decision therefore does not support petitioners' efforts to have the courts below resolve questions of title to land. But even if there were some inconsistency between the Ninth Circuit's decision in this case and its decisions in *South Delta* and *Joint Board*, that intra-circuit conflict would not warrant review by this Court.

the complaint on the basis of sovereign immunity. And the Court contemplated that the sovereign immunity issue would be litigated in the ordinary course of trial and appellate proceedings. 460 U.S. at 638. The Court in no way suggested that the United States' immunity to this suit had *already* been waived, nothwithstanding any statutory provision retaining the United States' immunity to suit, by virtue of the United States' participation in *Arizona* v. *California*.

Moreover, petitioners candidly admit (Pet. 15) that they have found no case to support their novel theory of waiver, and that theory in fact conflicts with the most basic principles of sovereign immunity. As the court of appeals properly held, waivers of immunity must be "unequivocally expressed" and construed "strictly and narrowly" (Pet. App. 7a). See *Block* v. *North Dakota*, 461 U.S. at 287. Thus, when the United States files suit, it does not waive immunity to counterclaims—even in the same suit, much less in an entirely separate action—that are beyond the scope of the United States' initial claim (Pet. App. 7a). See *United States* v. *Shaw*, 309 U.S. 495 (1940); cf. *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939) ("Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States.").[8]

[8] As petitioners recognize, none of the cases upon which they rely (Pet. 15 & n.8) is similar to this case. *United States* v. *The Thekla*, 266 U.S. 328 (1924); *United States* v. *Martin*, 267 F.2d 764 (10th Cir. 1959); and *United States* v. *Taunah*, 730 F.2d 1360 (10th Cir. 1984), all involved limited circumstances in which the United States may be susceptible to a counterclaim in the *same* action. In *Jones* v. *Watts*, 142 F.2d 575 (5th Cir. 1944), the court held that although a party could assert a counterclaim against the United States in a suit brought by the United States, it could not seek the identical relief in a separate lawsuit. See *Fidelity & Casualty Co.* v. *Reserve Insurance Co.*, 596 F.2d 914, 916-918 (9th Cir. 1979).

Petitioners' citation (Pet. 15) to *Minnesota* v. *United States*, 305 U.S. 382 (1939), is inapposite. There, the Court held that when a case is removed from state court to federal court, the federal court does not have jurisdiction over the case if the state court lacked jurisdiction, even if the federal court would have had jurisdiction if the suit had been filed there in the first instance. *Id.* at 388-389. This result has since been overruled by statute. Judicial Improvement Act of 1985, Pub. L. No. 99-336, § 3(a), 100 Stat. 637 (to be codified at 28 U.S.C. 1441(e)).

Here, although the measure of the water right reserved by the United States on behalf of the Tribe is determined in *Arizona* v. *California* by the number of practicably irrigable acres within the Reservation, the district court litigation initiated by the water-agency petitioners goes far beyond establishing a basis for the quantification of water rights. In this suit, petitioners challenge the Secretary's statutory authority under 43 U.S.C. 772 to correct the boundary of the Fort Mojave Indian Reservation and, as a consequence, to adjust the boundary between lands held in trust for the benefit of an Indian Tribe and other federal lands. The court of appeals therefore properly characterized this lawsuit as a challenge to "the Secretary's authority and procedures [to] establish[ ] Indian reservation boundaries" (Pet. App. 8a (footnote omitted)), and thereby to ascertain the trust status of *land* owned by the United States. Unlike *Arizona* v. *California*, it is not limited to, and does not even directly concern, the determination of *water* rights.

4. The decision of the court of appeals does not adjudicate the merits of the Secretary's 1974 order. The court merely held that petitioners cannot challenge that order in this suit against the Secretary in district court. As the Court made clear in *Arizona* v. *California II*, the Secretary's orders correcting the boundaries of the three Reservations cannot result in an increase in the reserved water rights for those

Reservations unless petitioners are first given an opportunity to challenge those orders. 460 U.S. at 636. Because petitioners are barred by sovereign immunity from challenging the orders in this case, they of course must be afforded a suitable opportunity to do so in another forum—*e.g.*, in this Court, following a renewed motion by the United States to amend the decree in *Arizona* v. *California,* or, if appropriate, in other proceedings initiated for that purpose. Now that the court of appeals has disposed of this case on jurisdictional grounds—a disposition that this Court recognized was possible in 1983—the United States will consider what other steps should be taken to bring about a prompt resolution of these boundary issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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